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# Chapter 121A

## A Handbook for Local Officials

Massachusetts Executive Office of  
Communities and Development  
Byron J. Matthews, Secretary

Commonwealth of Massachusetts  
Edward J. King, Governor









Dear Local Official:

Since its enactment in the early 1960's, Chapter 121A has emerged as one of the most important development incentives provided by state government. The successful utilization of Chapter 121A has resulted in the investment of hundreds of millions of dollars in the Massachusetts economy and in projects which generate tremendous social and economic benefits for our citizens.

In recent months, my office has witnessed a significant increase in the number of Chapter 121A projects being proposed throughout the Commonwealth. This trend is encouraging since it reflects a growing confidence by the private sector in the future of our cities and towns.

The purpose of this handbook is to promote a better understanding of Chapter 121A by providing local officials with a basic explanation of the statute and its practical application. The handbook also suggests possible strategies for negotiating tax agreements under Chapter 121A.

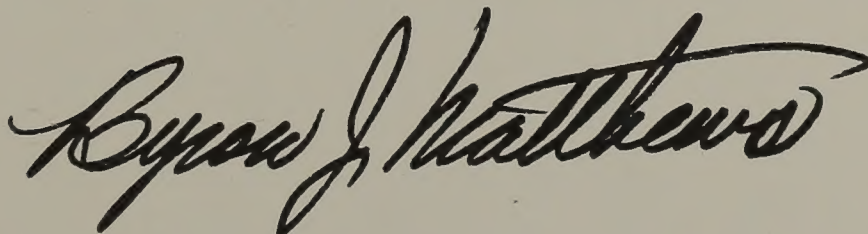
This is the first guidebook on the use of Chapter 121A ever published and it is my hope that it will greatly facilitate the Chapter 121A process at the local level.

The publication of this handbook was financed by a grant from the Massachusetts Executive Office of Communities and Development (EOCD) to the University of Massachusetts, School of Business Administration, Center for Economic Development. We wish to acknowledge the thorough job done by the Center's staff, and to thank the many state and local officials who reviewed drafts of this handbook.

I suggest that local officials avail themselves of the technical assistance on Chapter 121A which is available through the Executive Office of Communities and Development and its Division of Community Services. The use of this handbook in conjunction with assistance from the Division's professional staff is the best way to approach local consideration of a Chapter 121A proposal.

I welcome your comments on this report.

Sincerely,



Byron J. Matthews, Secretary  
Massachusetts Executive Office of  
Communities and Development

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*Cover: Central Grammar School,  
Gloucester, housing for the elderly,  
one of the earliest building re-use  
projects utilizing Chapter 121A and  
MHFA financing.*

**Chapter 121A**  
**A Handbook for Local Officials**

Massachusetts Executive Office of  
Communities and Development  
Byron J. Matthews, Secretary

Commonwealth of Massachusetts  
Edward J. King, Governor

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November 1979

**Table of Contents**

Introduction, 1

Chapter One  
The Intent and Use of Chapter 121A, 3

Chapter Two  
The Chapter 121A Approval Process, 7

Chapter Three  
The Framework for Negotiating a  
Chapter 121A Agreement, 13

Chapter Four  
Determining the Appropriate  
Level of Tax Payment, 17

Chapter Five  
Conclusion, 23





# Introduction

The purpose of this handbook is to provide local officials in Massachusetts with guidance in the utilization of the development incentives available under Chapter 121A of the Massachusetts General laws.

It must be clearly understood that this handbook should in no way be construed as a substitute for or as superseding either the enabling statutes as amended or the relevant regulations promulgated by the Secretary of Communities and Development. This handbook is only intended to present straightforward practical advice in the local application of this important development tool.

Local officials can obtain copies of the Chapter 121A statutes and regulations from the Division of Community Services, of the Executive Office of Communities and Development (EOCD) at One Ashburton Place, Boston, Massachusetts, 02108; or by calling (617) 727-7180.

This handbook should be used in conjunction with the technical assistance which is available from the Division of Community Services. The Division strongly encourages consultation at the earliest possible stages in the Chapter 121A process as a valuable means of maximizing the exchange of information and expediting the consideration of an application.

Local officials may also want to consult another EOCD publication which provides further background information on Chapter 121A. It is entitled "Tax Certainty for Public Amenities: Chapter 121A" and it explains the possible extension of the duration of a tax agreement by incorporating certain amenities in the project plan. This booklet is available from the Division of Community Services.

EOCD also maintains a regular tabulation of the prevailing average tax payments being made by Chapter 121A projects. This information enables local officials to compare proposed projects with similar existing projects in order to help arrive at an equitable level of payment. As above, this information is available from the Division of Community Services.

Chapter 121A provides that the Boston Redevelopment Authority (BRA) and not EOCD will administer the Chapter 121A Program in the City of Boston. Thus, applications for the approval of Chapter 121A projects which are to be situated in the City of Boston must be in conformance with the regulations promulgated by the BRA. While much of the material in this handbook is also applicable to Boston projects, it is essential that Boston developers and other interested parties should consult directly with the BRA for information about the use of Chapter 121A. The BRA also offers technical assistance to developers proposing Chapter 121A projects. The Chapter 121A Coordinator for the BRA can be reached at (617) 722-4300.

One final introductory comment deals with the use of terminology. The term "Executive Office of Communities and Development" (EOCD), as used in this handbook, should be regarded as meaning the "Department of Community Affairs" and/or the "Housing Board" as used in the statutes or regulations. The different terms merely reflect the historical evolution of EOCD.

It is hoped that local officials and others will find this handbook to be a useful tool in understanding and applying the incentives embodied in Chapter 121A in a manner which will yield desired public benefits.





*Coe's Pond Village, Worcester,  
financed through MHFA.*



# Chapter One

## The Intent and Use of Chapter 121A

### Overview

Chapter 121A of the Massachusetts General Laws authorizes the creation of "Urban Redevelopment Corporations" for the purpose of undertaking residential, commercial, civic, recreational, historic and industrial projects in areas which are considered to be blighted open, decadent or substandard. This statute:

- ☐ Authorizes the exemption of certain Massachusetts developments from the real property tax.
- ☐ Sets forth procedures for negotiating an alternative tax payment on these developments, and
- ☐ Allows the exercise of the power of eminent domain to assemble a development site in specified circumstances.

Over 250 major developments throughout the Commonwealth have been financed under the provisions of Chapter 121A since the early 1960's. These developments represent the investment of well over one-half billion dollars in Massachusetts by the private sector.

The most frequent application of Chapter 121A has been in the construction of housing for low and moderate income families. Approximately 94% of all Chapter 121A projects developed to date have been residential. Only 16 commercial projects, have been undertaken and, to date, no exclusively industrial projects have utilized a Chapter 121A agreement. Prominent examples of non-residential Chapter 121A projects include the Prudential Center in Boston and Baystate West in Springfield.

Chapter 121A is designed to stimulate development in Massachusetts by making tax payments on eligible investments both predictable and affordable. Tax agreements are established to assure the feasibility of certain desirable projects. They are negotiated to compensate for the state's over-reliance on the property tax, and to provide the tax predictability which is necessary for major investments under certain circumstances.

### Incentives

The Chapter 121A mechanism affords certain incentives to prospective developers including:

- ☐ Tax Certainty. The contractual nature of the payment provides stability and certainty to the entity's level of taxation.
- ☐ Level of Taxation. Chapter 121A agreements provide the flexibility on the level of taxation which is needed to initiate otherwise infeasible investment decisions, particularly in high tax communities.
- ☐ Eminent Domain. The 121A entity has the authority to exercise the power of eminent domain under certain carefully prescribed conditions in order to assemble land for a project site. Although eminent domain has never been exercised by a Chapter 121A entity, it remains legally possible.



## **Benefits for the Community**

Chapter 121A is generally regarded as an important vehicle for inducing much-needed investment, particularly in older urban municipalities. The following are some of the major beneficial impacts of Chapter 121A:

- ☐ Without a Chapter 121A tax agreement, many development projects would be financially infeasible. This is a problem often experienced in urban communities where high property tax rates are prevalent.
- ☐ The Chapter 121A process can be utilized as an incentive to investment in areas which would otherwise be only minimally marketable as a location for private investment. Thus, Chapter 121A can be considered a major weapon in a community's assault on blighted or deteriorating areas.
- ☐ Chapter 121A gives communities the leverage to become active participants in the planning of major projects. This can be extremely important in negotiating important items such as site selection, building design and employment for local residents.
- ☐ Chapter 121A projects often act as a catalyst in stimulating other private investments in a community. In this way, Chapter 121A can be an important tool in a community's effort to expand its tax base and thereby reduce the overall tax burden.

## **Deciding to Participate in the Chapter 121A Program**

A Chapter 121A tax agreement must be justified by the beneficial impact which the proposed project will have on the community. One important aspect of negotiating a Chapter 121A agreement is, therefore, a careful analysis of the project's impact to determine whether a Chapter 121A project is appropriate in a particular instance.

The following checklist is intended to provide local officials with a listing of the general community issues which a Chapter 121A development might

address. This checklist constitutes a framework for deciding to participate in the Chapter 121A program.

- ☐ To what extent does the blighted nature of the project site result in a special community interest in achieving its redevelopment?
- ☐ How much construction and permanent employment will the project generate?
- ☐ What is the level of need in the community for the type of project proposed (e.g., elderly housing, commercial space, office building, etc.)?
- ☐ What kind of special design features are proposed which make the development particularly attractive to the community (e.g., handicapped facilities, reuse of an old building, provision of recreational space or community facilities)?
- ☐ What are likely to be the costs to the community of providing essential public services to the project compared to the amount of revenue to be realized?
- ☐ Does the developer's financial source impose any special restrictions on the project's operating expenses (e.g., the Section 8 Housing Assistance Program)?
- ☐ What additional cost will the developer incur in providing special facilities or features which respond to community needs?
- ☐ What is the level of tax revenue realized by the community from this site prior to redevelopment?

Local officials can look to data contained in the developer's Chapter 121A application for help in drawing conclusions. Generally, projects which will have a positive impact on a community are worthy of consideration if they require a tax agreement in order to attain feasibility.

Unfortunately, there are no mathematical formulae which can compute either the positive impact of the project or the level of need for a tax agreement. In



the final analysis, local officials will be required to make a well-reasoned judgement about participation in the Chapter 121A program. This judgement should be based, to the extent possible, upon facts which have been researched and verified. The subsequent chapters in this handbook are designed to help local officials think through these issues.





*The Wentworth House, Lowell, 100 year old warehouse building currently being rehabilitated as housing for the elderly, construction financed by the MHFA.*





# **Chapter Two**

## **The Chapter 121A Approval Process**

This Chapter will outline the Chapter 121A approval process. The purpose of this outline is to summarize the mandatory approval sequence prescribed by the statutes and regulations in a more concise and readable format.

### **Types of Chapter 121A Entities**

Urban Redevelopment Corporations may be formed as single purpose for-profit corporations, non-profit corporations, partnerships or joint ventures. Insurance companies and banks may also qualify under special statutory provisions. In fact, many Chapter 121A entities are not corporations per se, but are organized in some other format.

### **Applications**

The formation of a Chapter 121A entity must be authorized by EOCD and the municipality within which the proposed project is to be located. An application to establish such an entity must include the following elements:

1. A description of the legal composition and basic background information about the proposed entity.
2. The location of the proposed project (including a detailed engineering or "metes and bounds" description).
3. A description of the proposed project (including a site plan, elevations, floor plans and outline specifications).
4. A statement on the relationship of the project to the community's Master Plan.
5. A justification of the designation of the project area as blighted open, decadent or substandard.

6. A description of any amenities which may justify an extended duration of the tax agreement.
  7. Special information on subsidized housing or housing for low and moderate income families.
  8. The development schedule.
  9. The cost and means of financing for the project.
  10. A statement of the project's anticipated impact on the community.
  11. Evidence of the project's practicability.
  12. A copy of the proposed contract with the municipality for additional tax payments to be made under Section 6A.
  13. A relocation plan (if applicable).
  14. An Environmental Notice Form and, if required, an Environmental Impact Report (special environmental regulations govern Chapter 121A projects and they should be closely reviewed).
  15. A draft Regulatory Agreement (see page 9 for an explanation of the Regulatory agreement).
  16. Other pertinent information as may be required.
- EOCD strongly recommends a meeting between the staff of the Division of Community Services, the developer and his attorney even prior to the completion of a Chapter 121A application. This meeting will serve as an orientation for the developer and will almost always save time in the application process.



While not specifically required in the regulations, it is also recommended that municipalities ask developers to submit a detailed analysis clearly indicating the reasons why a project would be infeasible without a Chapter 121A Agreement. This will provide a focus for later discussions and negotiations.

Applications for the formation of Urban Redevelopment Corporations are submitted by the developer to EOCD, examined for completeness and forwarded to the community for local action.

EOCD also circulates the completed application to the agencies participating in the review and comment process established under Office of Management and Budget Circular A-95. While this review is not required by statute or regulation, it is undertaken by EOCD as a means of assuring the consistency of the proposed project with other state policies and activities. The A-95 review runs concurrently with the local approval process and is designed to dovetail with the completion of local approvals.

## **Fees**

The Executive Office of Administration and Finance requires developers to pay an application fee amounting to one-twentieth (1/20) of 1% of the total development costs of the project not to exceed \$1,000. This fee must be paid to the Commonwealth of Massachusetts at the time of the submission of the application by the developer to EOCD. EOCD has ruled that non-profit development corporations are exempted from the required application fee.

## **Local Approval Process**

The Chapter 121A statutes and regulations make several important distinctions between cities and towns in terms of the local approval sequence. The basic difference is that in a city, the City Council acts as the *local governing body* and the Mayor or City Manager acts as the *chief executive*. In a town, however, the Planning Board plays the role of the *local governing body* and the Board of Selectmen acts as the *chief executive*.

The following is a schedule of mandatory local approval activities for cities and towns respectively.

## **Approval Process in a City**

1. Within 45 days of the receipt of the application a joint public hearing must be held by the Planning Board and City Council. This public hearing is designed to ascertain whether the proposed project is in the public interest. It is suggested that the City Council take the lead role in arranging for the public hearing.

2. Notice must be given to all abutters, including any living in contiguous cities and towns, and published in a newspaper of general circulation once in each of two successive weeks, the first at least 14 days prior to the date of the hearing.

3. Within 45 days of the public hearing, the Planning Board reports to the City Council. In a city, the Planning Board is only advisory to the City Council.

4. Within 45 days after receipt of the Planning Board report, or within 90 days from the date of the public hearing (if the Planning Board did not take 45 days), the City Council reports to the City Manager or the Mayor.

5. Within 30 days after receipt of the City Council report, the City Manager or Mayor reports to EOCD indicating approval or disapproval.

## **Approval Process in a Town**

1. Within 45 days of receipt of the application, the Planning Board holds a public hearing. (If there is no Planning Board, the Board of Selectmen acts as the Planning Board.)

2. Notice must be sent to all abutters and published in a newspaper of general circulation as noted for a city.

3. Within 45 days from the public hearing, or a total of 90 days from receipt of the application, the Planning Board reports to the Board of Selectmen. In a town, Planning Board approval is required.



4. Within 30 days from receipt of the Planning Board report, the Board of Selectmen report to EOCD indicating approval or disapproval.

### **Mandatory Findings**

In both cities and towns, the approval of a Chapter 121A application must incorporate the following findings:

- ☐ That blighted open, decadent or substandard conditions exist within the proposed project area.
- ☐ That the project is not in contravention of any zoning, subdivision, or building ordinance or by-law or rules or regulations in effect in the city or town.
- ☐ That the proposed plan does not conflict with the Master Plan.
- ☐ That the project is not detrimental to the best interests of the public or the city or town.
- ☐ That the project is in the best interests of public safety and convenience.
- ☐ That the project is not inconsistent with the most suitable development of the city or town.
- ☐ That the project will constitute a public use and benefit.
- ☐ That the relocation plan (if required) is satisfactory.

After having made the mandatory findings, municipalities will prepare an agreement with the developer (the Section 6A contract). This contract will specify the duration of the agreement, set forth the schedule of any payments above the statutory minimum and incorporate special conditions which have been negotiated with respect to parking, resident employment, exterior design treatment or other aspects of the project.

Municipalities enjoy the discretion to conditionally approve an application or to disapprove with the stipulation that the application will be approved

pending agreement on one or more items which may remain unresolved.

### **EOCD Approval Process**

After the local approval process is completed, the municipality must transmit the following information to EOCD:

- ☐ Certifications which give evidence of the satisfactory completion of the required local approvals.
- ☐ The application and all relevant data including any amendments which may have been negotiated.
- ☐ The agreement which defines the total level of the tax payments to be made by the developer (the "Section 6-A" agreement).

EOCD then reviews the developer's application as amended and approved by the municipality. Also to be approved is a "Regulatory Agreement" between the developer and the Executive Office which:

1. Sets forth the project cost and method of financing.
2. Requires compliance with all applicable rules and regulations.
3. Limits cumulative annual return on investment to 8% of the amount invested in the project.
4. Mandates the payment of the excise as prescribed.
5. Provides that the project's books shall be open for reasonable inspection.
6. Specifies construction, maintenance and management requirements.
7. Requires the prior approval of EOCD in the event that the project is to be transferred, assigned or sold.

The Secretary of Communities and Development may conduct an additional public hearing on the



application if EOCD determines that a further hearing is warranted under the circumstances. The Secretary must conduct a public hearing if requested to do so by a petition signed by at least 25 tax-paying inhabitants of the subject community.

### **Issuance of Approval or Disapproval**

After EOCD has determined the disposition of the application, the Regulatory Agreement is executed, the letter of approval is issued and the formation of the Urban Redevelopment Corporation can be approved by the Secretary of State. EOCD must, at this time, also approve any request for the extension of tax benefits based upon the provision of amenities.

If a project is disapproved by EOCD, the reasons for the disapproval must be stated in writing and changes may be suggested to meet the objections. If the applicant proposes changes in the plan to meet EOCD's objections and if these changes result in altering the submission substantively, the proposed change must be sent to the local chief executive and a repetition of the initial local approval process must occur.

If EOCD disapproves the granting of additional years of tax benefits based on amenities, the reasons for so doing must be stated and the application returned to the community for a hearing on the objections.

### **Appeals**

An appeal of the approval or disapproval of a project by the Mayor, Board of Selectmen, Planning Board or EOCD, or the failure of any of them to act within the stipulated time, may be made to the Superior Court in the county in which the proposed project is to be located. The appeal must be filed within 60 days of the action or lack of action which is the subject of the appeal.

### **Condominium Requirements**

The statute applies the following special conditions to the approval of condominium construction under Chapter 121A:

1. The conversion of rental units built under Chapter 121A to condominiums is not allowed.
2. The developer must be a corporation.
3. A project must be comprised of 50% rental housing.
4. At least 50% of the rental units must be for low-income persons or families and not more than half of these units may be for the elderly.
5. The leasing of condominium units as rental units requires EOCD approval.
6. The profit on the sale of condominium units must go into a guaranty fund and the same restrictions must apply to the buyer.

### **Tax Payments**

As indicated, Urban Redevelopment Corporations are exempt from the real property tax. Instead, these entities make three types of substitute payments.

☐ *Minimum Statutory Payment.* Section 10 of the statute requires that Chapter 121A entities pay a specified minimum excise tax to the state Department of Revenue. The computation of this minimum statutory payment is explained in more detail in Chapter Four. This payment is collected by the Department of Revenue but the entire amount is later returned to the municipality as a "Cherry Sheet" distribution.

☐ *Negotiated Payment.* Section 6A gives municipalities the prerogative to negotiate a payment above the minimum statutory payment. This payment is made directly to the municipality and local officials have wide latitude in determining the



amount of this payment. Chapter Four of this handbook is devoted to a discussion of ways to determine the level of this payment.

□ *Excess Income Payment.* Chapter 121A entities are “limited dividend corporations” and, by law, may earn no greater than an 8% return on investment. The statute provides that additional payments are to be made to the municipality to the extent that return on investment exceeds 8% after all other eligible deductions have been computed (up to the level of the tax which would be assessable if the project were a non-Chapter 121A entity). A developer who fails to achieve an 8% return on investment in one year is allowed to make up the difference in subsequent years. Practically speaking, this source of payment can be disregarded since few Chapter 121A corporations exceed the 8% limit and in fact many have accumulated substantial deficiencies in the level of earnings.

Recent Chapter 121A agreements frequently include escalation clauses which provide for an increasing tax payment over time. This feature enables a community to realize a specified level of increased revenue over the life of a project.

### **Duration of the Agreement**

The standard duration of a Chapter 121A agreement is 15 years. This period may be extended, however, by up to 25 years (for a total of 40 years) if the developer agrees to include certain “amenities” in the project. Among the types of amenities which earn an extension in the term of a Chapter 121A agreement are handicapped facilities, the employment of minorities or neighborhood residents and the rehabilitation of historic buildings. Subsidized housing for low and moderate income persons is always eligible for a 40 year agreement.

### **Limitations on Financing**

The statute also requires that no more than 90% of the cost of the project may be raised by borrowing. This limitation does not apply to residential projects financed through state or federal programs.

### **Eminent Domain**

The power of eminent domain is available to Chapter 121A developers in order to facilitate the assembly of the project site. However, it has never actually been used in the implementation of a Chapter 121A project. Eminent domain is not automatically available and must be specifically requested in the application. The Chapter 121A regulations set forth the procedures to be used in the event that eminent domain is proposed in an application and actually exercised in a project.

### **Waivers**

EOCD has the authority to waive any requirement which is not mandatory under the statute or which would be counter to the intent of the law. Waivers are granted only in extreme cases and requests for a waiver must be fully documented.

### **Judicial Review**

Chapter 121A has been subjected to intensive judicial scrutiny. The Massachusetts Supreme Judicial Court has found, in two separate opinions, (341 Mass 760 and 343 Mass 375) that the Chapter 121A process is legally and constitutionally valid.





*Madison Park, Roxbury, sponsored  
by Lower Roxbury Community  
Development Corporation, financed  
through MHFA.*



# Chapter Three

## The Framework for Negotiating a Chapter 121A Agreement

The next chapter of this handbook will deal with many of the technical aspects of negotiating Chapter 121A agreements. First, however, several suggestions about the policy and administrative dimensions of Chapter 121A are appropriate.

In most communities, the consideration of a Chapter 121A application is a highly visible and occasionally controversial undertaking. The nature of the process will, therefore, require local officials to be judicious in its use, and to be open and equitable in their dealings with Chapter 121A applicants.

The following guidelines on general approach are designed to facilitate local consideration of a Chapter 121A application.

□ *Openness.* While the Chapter 121A application procedure may appear complicated, local officials should recognize that the rationale for the system of numerous checks and balances arises from a legislative concern for the protection of the public interest. The framers of the process were particularly careful to provide for public hearings, for the disclosure of all pertinent financial information and for judicial review by aggrieved parties. Local officials should conduct the process in this spirit not only as a means for achieving compliance with the regulations, but also as a technique for building public confidence in and support for the proposed project.

□ *Equity.* Negotiating a Chapter 121A agreement involves a balancing of the financial viability of a proposed development with the best interests of the community. Local officials bear the responsibility of determining the extent and duration of any possible tax agreement in such a way that the

overall long term impact can be demonstrated to be equitable in terms of its costs and benefits to the community. There are no mathematical formulae which can yield a definitive conclusion in this regard. Nevertheless, local officials must reach an agreement which can withstand the test of public scrutiny.

□ *Process.* Statutory and regulatory guidelines should be followed precisely in order to avoid time consuming and potentially troublesome backtracking. Particular attentiveness to prescribed time frames for hearings, notices, and decisions is required. A single professional person should be designated as the manager of the application process in any community which expects to utilize Chapter 121A to a significant degree. This person should become thoroughly familiar with the Chapter 121A program and should be responsible for guiding the application through the local approval process. The maintenance of complete and accurate records at each stage in the process is also crucial. Good records will protect the interests of both the municipality and the Chapter 121A applicant.

□ *Roles and Responsibilities.* The statute and regulations assign specific responsibilities to a number of different local officials. The local chief executive, the City Council, the Board of Assessors, and the Planning Board all have legally defined roles in the Chapter 121A process. In addition, some municipalities have community development or industrial development officials who may become involved. Experience has shown that problems and delays can occur when parties which have a legitimate role in the process are not fully informed about the application at the outset and are ill-informed about the application's progress. While not specifically required to do so by the regulations,



the local chief executive should assume responsibility for notifying all appropriate local officials of a pending application. The chief executive should also assure that lines of communication between the appropriate local officials are continuously maintained throughout the process.

□ *State Role.* EOCD combines its authority to issue final Chapter 121A approval with an active program of technical assistance to municipalities in the use of Chapter 121A. One of the most valuable services available is an up-to-date compilation of prevailing Chapter 121A tax payments for different types of projects. These “comparables” should be an invaluable source of guidance in determining payment levels. EOCD would like to become involved in the local consideration of a Chapter 121A application at the earliest possible moment. This will greatly facilitate the local approval process, especially in communities using Chapter 121A for the first time.

Some communities which intend to use Chapter 121A extensively may benefit from a locally developed set of written policy guidelines and specific procedures which describe a municipality's attitude toward and process for entertaining Chapter 121A applications. This document may include any unique local requirements such as information to be required on the project's beneficial impact (including catalytic effects, jobs created, etc.) as well as the submission of special documentation on construction and operating costs. The preparation of this kind of local policy document is encouraged by EOCD and technical assistance in its development would be available from the Division of Community Services.

It is strongly recommended that the Board of Assessors play the dominant role in negotiating the level of payments to be made under Section 6A of Chapter 121A. This procedure takes advantage of the substantial expertise which assessors have accumulated in this area, is consistent with their overall mandate, and will avoid conflict with other local officials (e.g., Planning Board, chief executive, etc.).

The Board of Assessors should, however, communicate regularly with the other parties who have responsibility for managing other aspects of the agreement so that they can make a fully informed decision. For example, they will need to know about any extended benefits which may be approved by the Planning Board beyond the minimum of 15 years, about general public reaction to the proposed development, about the relationship of the project to other local development priorities, and about any spin-off benefits which might accrue to the municipality. All this information should be discussed in detail with the other appropriate local officials.

A negotiated Section 6A agreement should ultimately be packaged with the other components of the Chapter 121A proposal by the local Chapter 121A coordinator for presentation at the required public hearing and for consideration by the Planning Board, City Council, Board of Selectmen, and chief executive.









*Academy Knoll, Marlborough,  
housing for the elderly, formerly a  
private school for girls, financed  
through MHFA.*



# Chapter Four

## Determining the Appropriate Level of Tax Payment

Communities must consider three variables in determining the tax payment to be made by a proposed Chapter 121A project:

*1. The Amount of Payment.* While Section 10 of Chapter 121A establishes a minimum statutory payment, Section 6A allows a municipality to negotiate a payment above the minimum. In virtually all cases, the minimum statutory payment is exceeded by a negotiated amount. For purposes of the discussion in this chapter, however, the distinction between the two payments will be ignored and the payment will be referred to only as a combined total. In addition, this chapter will omit any reference to payments of earnings in excess of the 8% limit since this very seldom occurs in practice. The “6A agreement,” as it is commonly referred to, sets forth the contract between the developer and the community with respect to the tax payments to be made by the developer.

*2. Escalation Clause.* The Section 6A agreement may include a provision for an increase in the tax payment over the length of the agreement. An escalator can act as a mechanism to provide a lower payment during a project’s early years when it is least able to make a sizable payment and to gradually increase the payment as the project’s economic strength increases over time. An escalator can also assure the municipality of increased revenue from the project in a fashion which may reflect the behavior of the community’s tax rate.

*3. Duration of Agreement.* The standard duration of a Chapter 121A agreement is 15 years. Both the provision of subsidized housing and the inclusion of certain amenities can earn a project an extended time frame for the tax agreement. The maximum period is 40 years.

By careful negotiation and by specification of these three variables, a community can determine the level of payment, over time, to be made by the developer. The statute and the regulations contain definite rules for the application of these variables and they should be extensively reviewed as part of the local consideration of a Chapter 121A application.

### Background

Before explaining the use of these variables, several preliminary issues must be detailed:

☐ *Maximum Feasible Payment.* It is assumed that local officials will seek to negotiate an agreement which requires the payment of the maximum amount of taxes which is possible without undermining the stability of an otherwise sound proposal.

☐ *Subsidized Housing.* Historically, a very high percentage of Chapter 121A projects have been undertaken for the purpose of constructing low and moderate income housing. Since the financing of both the construction and the operation of subsidized housing tends to be highly regulated by the state and federal government, the discretion of local officials in negotiating a tax agreement on such a project is somewhat restricted. For example, the current primary source of funding for the operation of subsidized housing is the Section 8 Housing Assistance Program administered by the U.S. Department of Housing and Urban Development. Section 8 operates on a system of mandatory maximum “fair market rents” which effectively limits the amount of funding available for the payment of taxes. It is strongly recommended that local officials negotiating a tax agree-



ment with a developer utilizing a state or federal housing subsidy program, consult with the funding agency to determine the approximate level of taxation which such projects can bear.

☐ *Fair Cash Value.* The statute requires that by March of each year, the local Board of Assessors determine and certify to the state Department of Revenue the fair cash value of the property as of January first of that year. The methods to be used in establishing the fair cash value for the property are the same procedures normally used by the assessors in establishing conventional property values and are described in Volume 1 of the Massachusetts Assessors Manual published by the Department of Revenue.

☐ *Income and Expense Statement.* Essential to the computation of both fair cash value and a schedule of tax payments, is the submission of a project income and expense statement by the developer. This information should be kept as close to standard as possible for all Chapter 121A projects. A prototype income and expense statement is available from the Division of Community Services. The developer should also be requested to submit other relevant data as may be appropriate under the circumstances.

☐ *Definitions.* It is critical that both the developer and local officials have a clear and precise understanding of the terms used on the income and expense statement. The misinterpretation of a term can cause confusion and result in errors in computation which may cost thousands of dollars in lost revenue. The definition of gross income and the identification of eligible expenses are particularly critical. In addition, the components of the gross income computation for the Section 10 payment should be the same as those used in the computation of the Section 6A agreement (except payments made by the federal or state government on behalf of tenants which are excluded from the Section 10 computation).

☐ *Verification.* The experience of local assessors with conventional developments should provide a basis for the verification of the figures submitted on the income and expense statement. Again, this step is critical because of the impact that erroneous, inflated or deflated figures may have on later computations. Communities should plan to carefully review the income and expense statement each year for the duration of the tax agreement. Municipalities with a large number of Chapter 121A developments may find it useful to retain an independent accounting firm to conduct periodic audits of the income and operating statements of Chapter 121A entities.

☐ *Imputed Rent.* A special caution should be observed in the instance of projects in which the developer himself expects to become a tenant. The imputed value of the space to be occupied by the developer should reflect prevailing market conditions. Special provision should be made for adjusting the value of this space as market conditions change. An underestimation of the value of such space can result in an inaccurate gross income figure and cost a substantial amount of money in lost revenue. Commercial projects deserve special attention in this regard.

☐ *Tax Certainty.* After analyzing a project, a community may conclude that a reduced tax payment is unnecessary or inappropriate. In such an instance, a Chapter 121A application may still be approved, but with a tax escalator over the life of the agreement. While virtually no tax reduction may be involved, the important financial goal of tax certainty would still be attained. This may allow an otherwise infeasible project to proceed.



## **Negotiating the Tax Payment**

The negotiation of the Section 6A agreement is likely to be highly individualized in each community. The process will inevitably be tailored to suit the special circumstances of each local government. The following is a suggested method of approaching the determination of an appropriate tax payment within the context of unique local procedures.

*Step 1. Examine and verify the proforma income and expense statement submitted by the developer.* Both the income and expenses indicated on the statement should be scrutinized carefully by the assessors. The assessors should utilize their expertise in examining similar income and expense statements for conventional developments. Any statement submitted as evidence that the project could not be financially viable without a specific level of payment should be carefully examined.

*Step 2. Compute the level of taxation which would be applied if the project were a conventional development.* The "normal" level of taxation for the development will establish a frame of reference for subsequent computations. The assessors should use whatever method of determining full and fair cash value as may be the practice in the community (utilizing the Massachusetts Assessors Manual). The level of payment is presently determined by multiplying the fair cash value by the current tax rate. In the near future, the classification amendment will authorize the application of a specified assessment ratio to fair cash value in order to determine the valuation for the purposes of computing the tax payment.

*Step 3. Determine the level of revenue realized by the municipality without the project.* The assessors should consider the level of payment which would be forthcoming from the property in the event that the application is rejected. Again, this procedure will help in establishing the parameters for the decision.

*Step 4. Compute the minimum statutory payment required by Section 10 of Chapter 121A.* The assessors should calculate the minimum statutory payment and regard this figure as a floor for calculating additional payments to be negotiated under Section 6A. The following is a procedure for calculating the minimum statutory payment:

- A. Multiply the gross income of the project from all sources by 5%.
- B. Compute \$10 per \$1,000 of the fair cash value of the property as determined by the assessors.
- C. Total Item A and Item B above.
- D. Determine the average assessed value of the subject property for the last three years during which it was subject to taxation, less any abatements (or, in the case of land owned by a housing or redevelopment authority, for the 3 years prior to its acquisition by the authority).
- E. Multiply the tax rate for the current year by the fair cash value amount used in Item B or by Item D, whichever is smaller.
- F. The minimum statutory payment will be Item C or Item E, whichever is larger.

*Step 5. Consider the relationship of the tax payment to the feasibility of the project.* Local officials should, of course, examine whether the proposed project is feasible at all. A project which is poorly conceived and inadequately financed will probably result in later problems for the community. Assuming that the plan for the proposed project demonstrates a fundamental soundness, the assessors should determine the maximum possible level of payment without jeopardizing the project's viability. On the one hand, the assessors should be satisfied that the project would not be feasible without a Chapter 121A agreement. On the other hand, however, the assessors should seek a payment which is the highest possible without rendering the project unstable.



*Step 6. Consider any special conditions which might affect ability to pay.* Developers may advise the assessors of special circumstances which would limit the ability of the project to make tax payments. Each such special circumstance should be tested and evaluated on its merits. Probably the most frequently cited special condition is the limited ability to pay real estate taxes experienced by developers whose residential developments are to be financed under the Section 8 Housing Assistance Program. Another instance which may warrant an adjustment in the level of taxation is where a developer undertakes the initial project in a blighted area and where the risk is very high. Chapter 121A projects which have less risk may be able to sustain a higher level of payment. These are the types of unusual conditions which may be legitimate; but even in these cases, the extent of the inability to pay should be very carefully weighed.

*Step 7. Consult any precedent which may exist with respect to Chapter 121A payments for projects of similar size and type.* One of the most powerful factors in determining the total amount of the tax payments to be made is precedent. Many communities have developed formal or informal standards for the computation of Chapter 121A payments for different types of projects. For example, one community may customarily charge residential Chapter 121A projects 10% of gross income while another community may usually charge a Chapter 121A office building development 23% of a gross income. Even communities which have never approved a Chapter 121A application often research the amounts charged to similar projects in other communities of similar characteristics in developing a tax figure. Precedent is a crucial factor because of the desire of communities to treat developers equitably. Unless there are unique circumstances, there is a natural tendency to apply a similar charge to subsequent projects which bear a clear resemblance to an earlier Chapter 121A project. Deviations from precedent often require a detailed and persuasive justification in order to avoid charges of discrimination. The Division of Community Services maintains data on all Chapter 121A projects and will provide data on comparable projects on request.

*Step 8. Consider the possibility of a built-in escalation clause.* Most developments have a greater need for tax relief in the early years when the project must incur start-up costs and bear other financial uncertainties such as a gradual rent-up. As projects age, they become more stable and their ability to make tax payments increases. From the municipal perspective, there may arise a concern by local officials to obtain increased income over the life of a project as the cost of providing basic public services to the project increases. Since the payment is nearly always determined as a percentage of income, an increase in the rents charged to tenants as a result of other rising costs will yield some increase in the tax payment. A community may decide, however, that the ordinary increase in payments which can be anticipated are inadequate to meet rising municipal costs and that the net project income is actually decreasing as a result of inflation. A community may also feel that, while a lower level of payment may be justified in a project in its early years, as the project gathers economic strength over time, the extent of the tax payment should be increased accordingly. The Section 6A agreement can respond to all of these interests by incorporating a provision for an automatic escalator in the tax payment over time. Most of the escalation clauses which have been utilized to date involve a fixed rate for the project's early years with a gradually increasing rate over the life of the Section 6A agreement. One method for determining the rate of increase would be to calculate the average rate of increase in the community's tax rate over the previous ten years. This average increase could be applied to the base each year until a negotiated ceiling is reached. There are many other approaches and local preference and the special requirements of the development will determine the exact method used.



*Step 9. Establish the duration of the agreement.*

The normal period of the Section 6A agreement is 15 years, but it may be extended for as long as 40 years. The developer may have an interest in protecting the project from any major property tax increases for as long as possible. Some developers, however, may seek to terminate the agreement at the end of the 15 years as a means of lifting certain Chapter 121A restrictions such as the 8% limitation on earnings. The community may also want to terminate the agreement at 15 years in order to thereafter enjoy the full tax benefit of the project.

The extension itself is not automatic and projects must qualify by the inclusion of "amenities" which are in the public interest. The Chapter 121A regulations list several "amenities" which may result in an extension and also indicate the standard length of the extension. For example, subsidized housing projects can receive an extension of 25 years; handicapped facilities or open space qualify a project for an extension of up to 10 years. For a complete list of amenities and permissible extensions, interested officials and developers should review the Chapter 121A regulations.

The actual decision on an extension is made by the Planning Board in towns and by the City Council in cities. This decision should be communicated to the assessors as soon in the process as possible.

*Step 10. Develop a tentative tax payment.* Utilizing all the information gathered in the above steps, the assessors must now develop a tentative figure for the tax payment. In the absence of a mathematical formula to produce this figure, the assessors must rely on deduction and intuition. This computation should indicate the initial payment to be expected as well as any increment which is to be required by an escalator clause. The computation should also be based on the assumption that the developer will maintain a rent schedule which is reflective of prevailing fair market rents.

*Step 11. Afford the developer an opportunity to react to the tentative tax payment.* Given the inexact nature of the process, it is advisable for the assessors to give the developer an adequate opportunity to respond to the tentative tax payment schedule. This will avoid the possibility that the developer's data may have been inadvertently misinterpreted or that there may be other unforeseen and crucial implications which the level of payment may have on the project's viability.

*Step 12. Establish the tax payment schedule.* Having completed the process, the assessor should now be able to establish the payment schedule and communicate the results of the negotiations to the other appropriate local officials.





*The Mall at Assembly Square,  
Somerville, commercial and office  
space in abandoned automobile  
assembly plant (more recently a  
grocery distribution facility), portion  
of \$3.3 million UDAG project.*



# Chapter Five

## Conclusion

The nature of the Chapter 121A process means that its effective, judicious use can only be ensured through a cooperative effort by both state and local officials. EOCD is attempting to expedite the Chapter 121A process by the publication of this handbook and by the provision of expanded technical assistance to local officials and developers. Local officials, however, have the highest stake in Chapter 121A and hold the greatest potential for using it effectively. Local officials can make best use of Chapter 121A by taking steps to assure that the local approval process is conducted in a highly professional and timely fashion.

Despite its acknowledged complexity, Chapter 121A allows a great deal of flexibility in determining the type, location, and size of projects which may be undertaken. Chapter 121A proposals have ranged from the multi-faceted Assembly Square project in Somerville to relatively uncomplicated housing developments for low and moderate income families. Local officials should be creative in using Chapter 121A as a vehicle for implementing development strategies which are uniquely local in character.

One specific method for utilizing Chapter 121A as a local development tool would be to indicate to potential developers that a Chapter 121A agreement may be made available for well-conceived redevelopment proposals for certain blighted sites. In this way, Chapter 121A can become a feature of a community's marketing effort.

Chapter 121A can also be used in conjunction with a number of other development programs. Probably the most obvious linkage would be between the tax incentives of Chapter 121A and the financing

opportunities available under the industrial revenue bond program offered by the Massachusetts Industrial Finance Agency, the housing finance programs operated by the Massachusetts Housing Finance Agency and the U.S. Department of Housing and Urban Development, or the loan and loan guarantee programs available through the Economic Development Administration or the Small Business Administration. One particularly promising opportunity would be for the use of Chapter 121A in connection with the federal Urban Development Action Grant program.

In conclusion, local officials are encouraged to be aggressive and yet judicious in their use of Chapter 121A. The use of this tool depends almost totally upon local willingness to work with private investors. EOCD encourages local officials to achieve a greater understanding of Chapter 121A and to utilize the program, where appropriate, in the creative implementation of local development strategies which will serve to expand the local tax base.



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*Designed by Dennis O'Reilly  
Composition by Together Graphics, Inc.  
Printed and Bound by The Gazette*

*The preparation of this brochure was financed in part through a Comprehensive Planning Grant from the U.S. Department of Housing and Urban Development, under the provisions of Section 701 of the Housing Act of 1954, as amended.*







